

Bail Slip

The Petitioner viz., Veerasamy, aged 23 years S/o. Narayanan was directed to be released on bail in CrI.M.P.No.1/10 in CrI.A.No.113 of 2010 dated 03.03.2010.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.03.2019

CORAM:

THE HON'BLE MR. JUSTICE A.D. JAGADISH CHANDIRA

CrI.A.No. 113 of 2010

Veerasamy

/Vs/

... Appellant

The State Rep. By
The Inspector of Police
Suramangalam Police Station
Salem District.
(Crime No.19 of 2008)

... Respondent

PRAYER: Criminal Appeal filed under sections 374(2) of the Criminal Procedure Code, against the Judgment dated 18.02.2010 made in S.C.No.139 of 2009 on the file of the Sessions Judge & Mahila Court, Salem.

For Appellant : Mr.R.Nalliyappan

For Respondent : Mr.K.Prabakar
Additional Public Prosecutor

J U D G M E N T

The appellant is the sole accused in S.C.No.139 of 2009 on the file of the learned Sessions Judge & Mahila Court, Salem. He stood charged for the offences under Sections 366A and 496 IPC. By judgment dated 18.02.2010, the trial court found him guilty and convicted him under Section 366-A IPC and sentenced him to undergo five years Rigorous Imprisonment and to pay a fine of Rs.1,000/-, in default to undergo Rigorous Imprisonment for one month and further found him guilty and convicted him under Section 496 IPC and sentenced him to undergo five years Rigorous Imprisonment and to pay a fine of Rs.1,000/-, in default, to undergo Rigorous Imprisonment for one month. Challenging the said conviction and sentence, the appellant/sole accused is before this Court with this appeal.

2. The case of the prosecution in brief, is as follows:-

(i) The Inspector of Police, Suramangalam All Women Police Station has laid a final report against the appellant/accused, alleging that on 29.10.2008 at about 8.30 a.m., while the victim Kavitha/PW.5 was proceeding, to the Tution Centre, the appellant/accused kidnapped her by inducement without the knowledge of her parents, with an intention that such girl may be seduced and that he took her to the park situated at Salem Chettisavadi and thereafter, he took her to his relative's house at Yercaud Adivaram and stayed there at night and on the next day took her to Murugan Temple at Yercaud Adivaram and illegally married her. The respondent police, after investigation filed the final report against the appellant/accused for the offences punishable under Sections 366A and 496 IPC.

(ii) After summoning the appellant/accused, the learned Judicial Magistrate, furnishing copies in due compliance of Section 207 Cr.P.C and finding that the case is triable by the Court of Sessions committed it to the file of the learned Principal District Judge, Salem. The learned Principal District Judge made over case to the Mahila Court for trial.

(iii) On appearance of the appellant/accused, the substances of the offences were put to the appellant/accused and when he was questioned, he denied the offences and thereafter charges were framed against him under Sections 366-A IPC and 496 IPC. The charges were duly read over and explained to the appellant/accused in Tamil and he pleaded not guilty and sought to be tried. Thereafter, to establish the guilt of the appellant/accused, the prosecution has examined witnesses PWs.1 to PW.9 and marked Exs.P1 to Ex.P.12 and no evidence was let in on the side of the defence.

(iv) After questioning, under Section 313 Cr.P.C and after hearing the arguments advanced on both sides, the learned Trial Judge convicted the appellant/accused as stated above.

3. The learned counsel for the appellant/accused would submit that the order passed by the learned Trial Judge is not sustainable on the following grounds:-

i) the Trial Court erred in convicting the appellant/accused without any legal evidence on record to prove the charges against him.

ii) A case of love affair and consensual relationship had been falsely projected as a case of abduction. He would further submit that the manner in which the case was registered and thereafter altered and re-altered would go to show the unfair motive and ill-intention of the prosecution to fix the appellant/accused. Originally, the case had been registered for offence under Section 366-A and thereafter, altered to one under

Section 376 IPC and later final report had been laid for offence under Section 366-A & 496. A case of consensual affair was falsely projected as a case of Section 366-A on account of the age of the victim being found to be above 16 years during the course of investigation.

iii) Admittedly, no charges have been framed against the appellant/accused for having physically or sexually abused the victim girl and no legal evidence has been let in by the prosecution to prove that the appellant/accused illegally married the victim girl.

(iv) The evidence of victim girl does not inspire confidence and no other material has been let in to show that the appellant/accused conducted a illegal marriage with the victim girl. Though, the victim girl is stated to have been studying in School at the time of occurrence no oral or documentary evidence have been produced by the prosecution to prove the age of the victim and as per medical evidence, the age of the victim is stated to be above 16 years and below 18 years. When the age certificate has been burked by the prosecution and when no ossification test had been conducted by the prosecution to prove the age of the victim beyond reasonable doubt benefit of doubt has to be rendered to the appellant/accused and he should be acquitted.

(v) No evidence had been adduced by the prosecution to prove that the victim girl was forced or seduced to have illegal intercourse with any other person to attract offence under Section 366-A.

4. The learned Additional Public Prosecutor would submit that the prosecution has proved the age of the victim girl by the evidence of PW.8/Dr.Panneerselvam, who has based on the X-Ray stated that the age of the victim to be more than 16 and less than 18 years and thereby, the age of the victim girl has been fixed as less than 18 years. Further, the victim girl/PW.5 had deposed that the appellant/accused had taken her under compulsion and that the appellant/accused had also tied Thali at a temple.

5. Heard the learned counsel for the appellant as well as the learned Additional Public Prosecutor appearing for State and also perused the records carefully.

6. Now, what is to be seen is that whether the prosecution has proved the case beyond all reasonable doubt and whether the learned Trial Judge is right in convicting the appellant/accused based on the evidence available on record.

7. Now, analysing the evidence of the prosecution, PW.1/Priya is the mother of the victim girl /PW.5. At the time of occurrence PW.5/Kavitha was stated to have been studying 8th Standard in Reddiyur Government High School. PW.2/Balan is the brother-in-law of PW.1 and PW.3/Kamala is the sister-in-law of PW.1. As per their evidence, the appellant/accused is residing near her house and that on 29.10.2008 at about 8.30 a.m., when the PW.5/victim girl was on her way to School, the appellant/accused waylaid her and took her to his relative's house and stayed there in the night and on the next day, the appellant/accused took her to the temple and tied Thali around her neck. Since, PW.5 did not come back home. PW.1 had informed to PW.2 that her daughter was missing and that PW.1, PW.2 and PW.3 made searches for her and that while they were enquiring, they got information that the appellant/accused was speaking with PW.5/Kavitha and that PW.1 had also heard that her daughter was seen with the appellant/accused and entertaining doubt that the appellant/accused would have abducted her daughter, PW.1 had lodged a complaint with the respondent police which was marked as Ex.P1.

8. On receipt of Ex.P1, PW.7 the Inspector of Police, Suramangalam All Women Police Station registered a case in Crime No.19 of 2008 for the offence under Section 366-A IPC. The FIR is marked as Ex.P6. PW.7 examined the witnesses and recorded their statements separately. During the investigation, the appellant/accused and the victim girl appeared before the Police Station and PW.7 sent a requisition to the Court for forwarding the appellant/accused and the victim girl to the hospital for medical examination.

9. PW.4 Dr.Vasantha Malliga examined the victim girl and issued a medical certificate, the requisition and the certificate issued by the Doctor were marked as Exs.P2 to Ex.P4. During her examination in Court PW.4 had stated that there was a possibility of PW.5 having subjected to sexual intercourse.

10. PW.8 Dr.Panneerselvam, Assistant Professor in Forensic Medicine Department at Salem GMKMC Hospital had received a requisition for medical examination of the appellant/accused regarding his potentiality and the victim girl regarding the age. He had examined the appellant/accused and issued a certificate regarding his potentiality on 04.11.2008, he examined the victim girl PW.5/Kavitha and issued age certificate. The requisition of the learned Judicial Magistrate and the certificate regarding the appellant/accused and the victim girl were marked as Exs.P9 to Ex.P11 respectively. He had deposed that as per Ex.P10 there was nothing to suggest that the appellant/accused was impotent and that he had also stated as per Ex.P11, the victim girl was aged about 16 years and below 18

years and he had certified that the age of the appellant/accused was aged about 22 years and below 24 years.

11. PW.7 had deposed that after registering the case she had visited the place of occurrence and prepared observation mahazar and Rough sketch in the presence of PW.6/Rajendran which were marked as Exs.P5 and Ex.P7.

12. On 05.11.2008, she had examined PW.5, the victim girl and WPC 1658 Dhanakodi and recorded their statements and she had also sent alteration report changing the provision of law from 366-A IPC to 376 of IPC. The alteration report is marked as Ex.P.8. After the completion of her investigation, she had placed the case records before her successor PW.9.

13. On 23.12.2008, PW.9 took up the case for further investigation and she examined PW.4/Dr.Vasantha Mallika and PW.8/Dr.Panneerselvam and recorded their statements and after completion of her investigation, she filed the charge sheet against the appellant/accused under Sections 366-A and 496 IPC.

14. As put forth by the learned counsel for the appellant/accused, originally the case had been registered for offence under Section 366-A IPC, thereafter, it had been altered to offence under Section 376 IPC and later the final report has been filed for offences under Sections 366-A and 496 of IPC suggesting that an attempt had been made by the prosecution to falsely project a case of consensual affair as case under Section 366-A IPC. The date of occurrence is on 29.10.2008 prior to the Criminal Law Amendment Act 2013, when the age of consent in a case of rape was above 16 years. Initially, as stated above the case had been registered for offence under Section 366-A and later altered to Section 376 IPC and after obtaining the medical certificate from the Doctor PW.4 that the age of the victim was above 16 years, the case has been once again altered to offences under Sections 366-A and 496 IPC.

15. PW.4, the Doctor who had examined the victim with regard to the sexual offence had stated that there was a possibility of having had sexual intercourse. Whereas, no allegation has been made that the appellant/accused sexually abused PW.5. Now analysing the evidence of the victim/PW.5 with the other evidence on record. PW.5 had stated that she was studying in a School and that the appellant/accused was a neighbour, she had stated that while she was on the way to the school on 29.10.2008 at 8.30 a.m., the appellant/accused waylaid her and under compulsion took her to a house and thereafter, had taken her to Yercaud and later had taken her to a house where they stayed in the night and on the next day morning he had taken her to a temple and tied a Thali. Whereas, in the cross examination she

had stated that two or three other persons accompanied the appellant/accused and that the appellant/accused had taken her to a house and there was another lady was in that house and further she had stated that only due to threat and compulsion she accompanied the appellant/accused. However, PW.5 has not spoken about the appellant/accused or other persons having physically or sexually abused her forced or seduced her to illicit sexual intercourse. Whereas, the evidence of PW.4, the Doctor would suggest that there was a possibility of PW.5 having had sexual intercourse. The evidence of PW.5 does not inspire confidence. Further, the respondent police have neither produced the birth certificate nor examined anybody from the school to prove that the victim girl was a student and thereby, it could be inferred that finding that the appellant/accused cannot be charged for offence under Section 376 IPC and only in order to fix the appellant/accused, the case has been altered to one under Section 366-A IPC, which requires the victim to be a minor and the age should be under 18 years which is not required for a charge of 376 IPC, when there seems to be a consensual relationship between the victim/PW.5 and the appellant/accused. This aspect creates a doubt in the prosecution case. Further, as submitted by the learned counsel for the appellant/accused no legal evidence had let in by the prosecution to prove that there was a marriage. It is the evidence of PW.5 that the appellant/accused tied a Thali, whereas, the Thali was not recovered. Further none of the independent witnesses have been examined to prove the charge under Section 366-A IPC and that there was a illegal marriage.

16. It is pertinent to state that Section 366-A IPC was inserted by Indian Penal Code (Amendment) Act 1923 in pursuance of a few Articles of International Convention regarding suppression of the Traffic in Women and Children. In order to prove the ingredients of Section 366-A IPC, the prosecution should prove two things viz., i) inducing a girl under 18 years to go from any place or to do any act, and ii) with intention or knowledge that such girl will be forced or seduced to illegal intercourse with another person. Thereby, the essence of offence under Section 366-A IPC lies in taking away a minor girl with intent that she may be forced or knowing that she would be forced or seduced to illicit sexual intercourse with any other person and not with the taker himself. In this case, the prosecution has not let in any evidence that the appellant/accused intended that the victim girl would be forced or seduced to illicit intercourse with someone other than himself or that the appellant/accused knew that it was likely that she would be so forced or seduced to illicit intercourse. When the prosecution has failed to prove the existence of this specific intention or knowledge that she will be forced or seduced to illicit intercourse with another person which is the

most important element in the constitution of the offence under Section 366-A, the Trial Court erred in convicting the appellant/accused.

17. In respect of the offence under Section 496 IPC, the prosecution has to prove by legal evidence that the accused with dishonest or fraudulent intention went through the ceremony of marriage and when going through such ceremony, the appellant/accused knew that notwithstanding those ceremonies, he was not thereby lawfully married to the complainant. The prosecution has miserably failed to bring home the guilt of the appellant/accused for offence under Section 496 of IPC also beyond all reasonable doubt.

18. Taking into consideration the facts of the case and analyzing the evidences on record, this Court is of the opinion, the Trial Court without understanding the charges and the evidence let in rendered an erroneous judgment finding the appellant/accused guilty of the offences. In view of the same, the Criminal Appeal is allowed. The Conviction and sentence imposed by the trial Court in S.C.No.139 of 2009 dated 18.02.2010 on the appellant/accused are set aside. The Appellant/accused is acquitted of all the charges levelled against him. Bail bond, if any, executed by the Appellant/accused, shall stand cancelled. The fine amount, if any, paid by the appellant/accused shall be refunded to him.

Sd/-
Assistant Registrar(CCC)

//True copy//

Sub Assistant Registrar

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To

1. The Sessions Judge & Mahila Court, Salem.
2. The Judicial Magistrate No.V, Salem
3. -do- Through The Chief Judicial Magistrate, Salem
4. The Superintendent, Central Prison, Coimbatore.
5. The Inspector of Police, Suramangalam Police Station
Salem District.

6. The Deputy Superintendent of Police, Salem
Rural Kondalampatti Police Station, Salem District.

7.The Public Prosecutor, High Court of Madras.

Copy To : The Section Officer, Criminal Section,
High Court of Madras.

+1cc to Mr.R.Nalliyappan, Advocate SR.No.20569

Cr1.A.No. 113 of 2010

PPA (CO)
GMY (26/04/2019)



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